**U.S. Department of Labor**

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

**Issue Date: 07 May 2004**

CASE NO.: 2003-LHC-971

OWCP NO.: 7-159117

IN THE MATTER OF

**WILLIAM J. BURTON**
Claimant

v.

**DELTA TERMINAL SERVICES**
Employer

and

**GRAY INSURANCE COMPANY**
Carrier

APPEARANCES:

William S. Vincent, Jr., Esq.
For Claimant

Collins Rossi, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by William J.

Burton (Claimant) against Delta Terminal Services, Inc. (Employer) and Gray Insurance Co., (Carrier). The formal hearing was conducted in Metairie, Louisiana on December 4, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibits 1 and 2, Claimant's Exhibits 1-8, 10, 11 and Employer's Exhibits 1-22. This decision is based on the entire record.[2]

## Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on December 14, 2000 and December 30, 2000;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on December 14, 2000 and December 30, 2000;
5. A Notice of Controversion was filed January 3, 2001
6. An informal conference was held on December 13, 2002;
7. The average weekly wage at the time of injury is disputed;
8. Employer paid Claimant benefits including temporary total disability from December 30, 2000, through December 26, 2001. Total benefits paid are $13,072.36;
9. Medical benefits have been partially paid;
10. Permanent disability and impairment rating is disputed; and
11. Date of maximum medical improvement is disputed.

## Issues

The unresolved issues in this proceeding are:

[1]The parties were granted time post hearing to file briefs. This time was extended up to and through February 2004.
[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "TR __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

1. Causation of psychiatric injury;
2. §7 Medicals;
3. Nature & Extent (including MMI);
4. Average Weekly Wage;
5. §908 (j) penalties; and
6. Attorney's Fees and Penalties

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant, a laborer, was 48 years old at the time of the formal hearing. Claimant testified that he was married for 23 years, and the father of two children; a daughter age 17, and a son who died in an auto accident in August 1999. Before working for Employer, Claimant worked as a delivery man for Lance, Inc., for 12 years, earning approximately $35,000 a year. Following the death of his son, Claimant did not want to interact with the public as frequently, and so he ended his employment with Lance, Inc. and became a custodian at a middle school in Jefferson Parish, Louisiana, on February 7, 2000 (TR 87). However, on September 6, 2000, Claimant quit the custodian position, explaining that he needed to make more money. The following day Claimant began working with TEST, Inc. as an instrument technician. Claimant testified that he was an average worker, but his skills were not good enough, and after two weeks, Claimant was terminated on September 22, 2000.[3]

Claimant searched for a job for three weeks following his release from TEST, Inc. Then in October 2000, Claimant was hired by Employer as a laborer on ships and barges. Claimant's job duties typically included loading and unloading vessels (TR 28), and he was expected to be able to lift up to 100 lbs. Claimant earned $9.44/hr. working for Employer, and testified that he worked between 42-54 hours per week (TR 62).

On December 14, 2000, Claimant was throwing heavy bags of garbage into a dumpster when he felt a twinge in his back. Claimant did not see a doctor. Claimant self-medicated with BC Powder, an over-the-counter pain medication, and after several days he felt better (TR 36-29).

[3] Claimant described an incident in which he misread a blueprint and drilled holes into a steel plate in the wrong location (TR 26).

On December 30, 2000, Claimant described working in the hold of a barge pushing "yellow grease" back into the barge. The substance was toxic to breathe as well as extremely slippery, and so Claimant explained that he and his co-worker, knee deep in "yellow grease", were working as quickly as possible. Claimant immediately felt a pain in his back. The pain was so severe Claimant remarked that he knew he had "messed up something." (TR 40). From the barge Claimant went to West Jefferson Hospital with the assistant foreman. He received an injection of pain medication, underwent x-rays, and was referred to a list of orthopedists for follow-up care. Claimant explained that he chose Dr. Kessler from the list of orthopedists, and promptly made an appointment.

Dr. Kessler treated Claimant's injury conservatively for a period of time and then referred him to his colleague Dr. Katz to perform surgery if that type of treatment was indicated (TR 41).

Claimant underwent surgery November 6, 2001. Claimant described both pre-and post-operative pain as being "unbearable." (TR 44). In the weeks following Claimant's surgery, he experienced very little improvement, and consequently, on December 17, 2001, Dr. Katz stated that he had exhausted his abilities to treat Claimant and recommended Claimant seek a doctor for pain management (TR 46). In spite of Dr. Katz's recommendation, Claimant stated that his efforts to have Dr. Gupta's treatment approved were unsuccessful.[4] Claimant testified that he had maintained his health insurance through COBRA, and therefore by paying $591 per month he was able to have his treatments at Dr. Gupta's pain management clinic covered until June 1, 2003, when Medicare began paying for Claimant's treatments (TR 44-50).

Dr. Gupta treated Claimant with a combination of surgical procedures as well as prescription medications. Claimant received trigger point injections of linocaine, as well as prescription medication Neurontin, Narco, and Soma. Claimant also was treated by other pain management physicians because Dr. Gupta does not perform pain blocks, and Drs. McCain and Rosenfeld could perform the necessary procedures (TR 58-61).

[4] Claimant went to Dr. Gupta for pain management. He has had to pay for Dr. Gupta himself as Employer/Carrier refused treatment. Claimant and his wife spoke with Mr. Jinks who handled the case for Carrier and were told Carrier would not pay for any more medical treatment. (Tr. 47-49).

Claimant was additionally being treated independently for insulin-dependant diabetes, anxiety and depression.[5] Claimant testified that his mental condition had worsened since the December 30, 2000, accident. Dr. Davis had been treating Claimant prior to his accident for depression and anxiety; however, Claimant's condition became more severe after the death of his son and his debilitating pain. Dr. Ehrensing was treating Claimant's diabetes (TR 131).

Claimant testified that he completed two LS-200 forms, one with the help of his attorney and the other by himself. The first LS-200, completed by Claimant alone, stated that he had not worked between December 2000, when the accident occurred, and February 5, 2003 (EX 7). However, at the formal hearing, Claimant explained that he had worked a single day for Employer, unsuccessfully performing "light duty" work painting posts, as well as having worked for Dominoes pizza as a delivery driver from March 1, 2001 until March 13, 2001. Claimant explained that his work at Dominoes was unsuccessful because he was in such severe pain that he was taking narcotic pain medication, which then made it unsafe for him to drive. Anecdotally, Claimant explained that he finally quit the job when he found himself driving the wrong way down a one-way street. Claimant completed another LS-200 on September 8, 2003, with the help of his attorney, in which he admitted having worked the above dates at the designated jobs (CX 6, p. 2).

Janet Burton

Janet Burton, Claimant's wife of 23 years, testified at the formal hearing. She confirmed much of Claimant's testimony. Mrs. Burton explained that although Claimant had fallen while working for Marrero Middle School in Jefferson Parish, and treated by a chiropractor for several weeks, he missed no work, and had no problems following the end of chiropractic treatment. She reiterated that the accident on December 30, 2000, was the worst accident, resulting in her husband being unable to drive or perform any menial tasks around the house (TR 109).

Mrs. Burton also explained that the business owned by her and her husband, a small convenience store called The Hot Spot, was an unsuccessful business venture which lost money consistently over the course of three years, from 1997-2000. Claimant and his family would alternate working in the store until it was forced to close due to its poor financial situation.

[5] Claimant explained that he was paying for his prescriptions for depression and anxiety himself (TR 62)

Carla Seyler

Carla Seyler, a vocational rehabilitation expert, prepared a report dated August 26, 2002 (EX 17) Ms. Seyler was accepted as an expert in vocational rehabilitation (TR 177). She performed a vocational analysis and labor market survey on August 26, 2002. (TR 179). Dr. Katz discharged Claimant to light or sedentary work in February 2002. (TR 181). In her August 26, 2002 labor market survey, she found seven jobs for Claimant, ranging in pay from $6 to $7 per hour, which were suitable for Claimant's educational and employment background a well as his physical condition as she perceived it to be. The jobs were as an unarmed security guard, a cashier, an alarm dispatcher, a shuttle bus driver, a production worker, a food and beverage cashier, and a garage cashier (TR 181). All of these jobs were approved by Dr. Katz in a form letter she sent to him. (TR 182). She did not send the same letter to Dr. Gupta. Instead, she attempted to schedule a conference with Dr. Gupta but was unsuccessful. (TR 190).

Ms. Seyler found six additional jobs in her August 15, 2003 report with pay ranging from $5.15 to $16.92 per hour.[6] (TR 184). All of the jobs would have allowed Claimant to sit or stand. Again, Dr. Katz approved the jobs on September 2, 2003. Furthermore, all of these jobs could be performed from a wheelchair. She did not present these job opportunities to Claimant. (TR 188). She also testified that if Claimant, when on his medications, drives the wrong way when driving, he would not be able to perform the driving positions. (TR 196).

Wage Evidence

Employer's Exhibit 3 contains the documents regarding the wages Claimant had earned.

## Medical Evidence

Dr. Robert Davis

Dr. Robert Davis is a board certified psychiatrist who has been practicing for 40 years. He is the Chief Psychiatrist at West Jefferson Medical Center a well as having a private practice. Dr. Davis first saw Claimant on July 29, 1999 for generalized anxiety and depression. Dr. Davis prescribed Effexor and Paxil. By

[6] Ms. Seyler identified two positions as a PBX operator, one job as a customer safety dispatcher, a position as a reservationist, a job as a workforce development officer, and position as a clerk (TR 184).

the following visit, on August 31, 1999, Claimant's condition had deteriorated. His depression was more severe, primarily due to the death of Claimant's 17 year. old son in an auto accident on August 7, 1999. Claimant was also experiencing financial hardship due to a failed business. However, by October 1999 Claimant was making excellent progress by way of medication.

According to Davis, on January 27, 2000, Claimant explained that his mood was better and he was looking forward to changing jobs and becoming a middle school custodian. On April 27, 2000 Claimant explained that he was happy with his new job, and was relieved to be rid of his corner store (the failed business) which had proven to be a source of anxiety. On July 27, 2000, Claimant was feeling fair and continuing to do well. His depression had abated to a 2 to 3 on a scale of 10. At Claimant's request Dr. Davis discontinued some of the medications; however, Claimant continued taking Xanax for anxiety (depo. at 13). When Claimant returned to Dr. Davis on November 1, 2000, he reported having problems sleeping and having an increased number of anxiety or panic attacks. His depression had increased to a 4 to 5 out of 10.

On December 30, 2000, Claimant suffered the work related accident at issue in this case. When Claimant returned to Dr. Davis on February 5, 2001, his condition had worsened considerably. Not only had he sustained the work-place accident, but January marked the birthday of Claimant's deceased son. Claimant reported that Paxil was not proving to be a helpful medication. Claimant reported his depression as 7 to 8 out of 10. In May 2001, Claimant reported having frequent panic attacks, and described his depression as 7 to 8 out of 10.

On August 27, 2001, Claimant expressed concern about impending back surgery and was overwhelmed with stress secondary to intermittent back pain and an inability to work. Dr. Davis explained that there is a relationship between pain and depression, and that the two certainly interact with each other (depo. at 20).

Following his November 2001, back surgery, Claimant returned to Dr. Davis on January 1, 2002. Claimant primarily complained of his back pain, and rated his depression as a 4 to 5 out of 10. He was concurrently being seen at the hospital for GI problems. On July 15, 2002 Claimant was diagnosed with failed back surgery, and had been receiving pain management treatment. Claimant had been required to keep a "pain journal" as part of that treatment. Claimant expressed increased depression and suicidal thoughts. He was despondent at the thought of chronic debilitating pain. Dr. Davis noted that the depression was significantly worse (depo. at 23).

In April 2002, Claimant was admitted to the hospital following an incident with police, in which he was reported to be violent and psychotic. According to hospital records dated April 17, 2002, Claimant experienced a toxic psychosis secondary to prescription drug abuse of the narcotic pain medication Oxycontin.

In the months that followed, September 2002 through December 2002, Claimant had some success managing his pain with nerve blocks; nonetheless, he reported to later appointments with Dr. Davis in a wheelchair and reported feeling both helpless and hopeless.

By January 2003, Claimant was not mentioning the death of his son, but instead complained almost exclusively of the chronic back pain. Claimant reported being confined to the house due to the colder weather as well as commenting that the new medication which he had been prescribed, Lexapro, was not effective.

Dr. Davis found Claimant to be honest and straightforward in his presentation. Based on his treatment, Dr. Davis did not feel Claimant could work at all, primarily because Claimant would be unable to function in a work environment as a result of the complications of both his pain and depression. The pain was so severe that Claimant would be unable to follow instructions or appropriately interact with customers or co-workers. His stress level would prevent Claimant from relating predictably in social situation or demonstrate any degree of reliability (depo., pp. 31-32). As of September 2003, Claimant remained unable to return to any kind of work.

Dr. Davis explained that as of November 8, 2003 there was no change in Claimant's condition. The pain which resulted from Claimant's work place accident had exacerbated Claimant's depression (depo., at 34). Dr. Davis based this opinion on the fact that prior to the failed back surgery, Claimant had been trying to work in spite of his depression, however, by July 2002, Claimant reported spending 23 of 24 hours a day in bed. Additionally, Claimant's limitations prior to December 2000 were much less severe. Dr. Davis agreed that his observations were based on his interactions with Claimant as well as Claimant subjective reports. He performed no independent testing on Claimant. Dr. Davis also agreed that when Claimant discontinues his medication his symptoms worsen.

Dr. John McCain

Dr. John McCain has been practicing for 7 years and is board certified in physical medicine and rehabilitation as well as pain intervention and anesthesiology. He was deposed post-hearing and his notes are Claimant's Exhibit 9.[7] Dr. McCain first examined Claimant on April 10, 2002.[8] Claimant was complaining of low back pain as well as leg pain. Claimant gave a history of a work related injury on December 30, 2000 and resulting lumbar surgery, a bilateral laminectomy at L4-5 on November 6, 2001. Claimant was primarily experiencing low back pain. At the time of the initial examination Claimant was taking the following medications: Insulin for diabetes; Xanax for insomnia; Paxil as an anti-depressant; Vicodin for pain; Soma as a muscle relaxer; and Naproxen as an anti-inflammatory. After examining Claimant, Dr. McCain diagnosed low back pain due to lumbar disc disease, post-surgical L4-5 bilateral laminectomies with L5 formanomies. Dr. McCain explained that due to Claimant's history he also recommended Claimant continue to see a psychiatrist (depo., p. 18). Claimant's surgery had prompted a higher likelihood of fiocet joint problems because of the spine destabilization caused by surgery, and Claimant and Dr. McCain discussed the success of nerve block injections.

Claimant returned on April 18, 2002, for the scheduled nerve blocks. Dr. McCain explained that the dual purpose of the nerve blocks is to 1) relieve the pain and 2) confirm the source of the orthopedic or neurological problem. Claimant's "pain journal" documented the success of the injections. Prior to the April 18, 2002, procedure Claimant rated his pain as an 8 out of a severity of 10. Following the procedure Claimant rated his pain as 2 out of 10. Dr. McCain explained that it was an indication that the fiocet joints were playing some role in Claimant's condition (depo., p. 22). Claimant had one hour of good pain relief and then a slow return of the pain. Dr. McCain explained that such symptoms are very objective evidence of pain.[9]

Claimant returned to Dr. McCain on May 24, 2002. Claimant's condition was unchanged, however, he described additional radicular pain into the soles of his feet. Dr. McCain chose to repeat the fiocet injections and additionally performed an S1 transformal on the left in an attempt to provide further relief. However, Dr. McCain was concerned that Claimant had undergone previous back

[7] Employer's counsel was not present for this deposition, although Claimant's counsel stated he had been notified.
[8] This document was originally incorrectly dated 2000.
[9] Claimant would have been unaware of the effective duration of lidocaine, therefore, the pain curve demonstrated objective pain.

surgery and therefore, there was concern as to the efficacy of epidural fibrosis injections. In fact, the concerns proved true as the medication did not reach the L4-5 segment, and the pain persisted (depo., p. 26) The response indicated that more than likely Claimant suffered from fibrosis[10] due to the initial surgery. Claimant's pre-procedure pain rated a 6, and after the procedure decreased to a 3. Dr. McCain explained that the reduction in pain is an objective indicator that the pain is in fact present. However, the failure of the injection medication to reach the area of the adhesion suggested that the pain would ultimately be untreatable (depo., p. 28). Dr. McCain added that there were no signs of symptom magnification. The physical exam was consistent with the findings post-procedure.

Dr. McCain discussed the procedures and evaluations performed by Dr. Rosenfeld in July 2002.[11] Dr. McCain explained that Dr. Rosenfeld performed a discography to further clarify the ideology of pain and the greatest source of pain. Based on the records of previous physicians and the radiological studies, Dr. Rosenfeld discontinued Claimant's prescriptions for Soma and Neurotin, and instead prescribed Gavitral and Zanaflex. The discography was consistent with the symptoms Claimant had related to Dr. McCain (depo., at 34). After the initial evaluation by Dr. Rosenfeld, there was a follow-up appointment on October 16, 2002. Based on the lumbar discogram performed, Dr. Rosenfeld noted an annular tear at L5-S1 as well as a broad based bulge at L4-5. It was Dr. Rosenfeld's impression that Claimant suffered from a L4-5 annular tear and post laminectomy/failed back syndrome. Dr. Rosenfeld suggested the IDET procedure to address discogenic pain.

Based on the instability of Claimant's spine, Dr. McCain did not feel that Claimant could ever return to heavy labor. Based on the degree of pain, and Claimant's admitted poor control of that pain, Dr. McCain was simply unaware of any job which Claimant could perform for 40 hours per week (depo., at 41).

Dr. Ralph Katz

Dr. Ralph Katz is a board certified orthopedic surgeon, whose deposition is Joint Exhibit 2 (JX 2). Dr. Katz works at Westside Orthopedics, where Claimant was initially seen by Dr. Kessler, Dr. Katz's colleague, on January 3, 2001. Dr

[10] Fibrosis is scar tissue which can cause additional traction on the ligaments, which in turn causes pain.
[11] Dr. David Rosenfeld's records are part of Claimant's Exhibit 7

Katz took over Claimant's treatment and therefore, reviewed Dr. Kessler's notes, and testified based on those notes.

At the initial visit with Dr. Kessler, Claimant gave a history of having three weeks of back pain following the December 30, 2000, work place accident. Claimant also complained of pain radiating down his left leg. After x-rays and a physical examination which had a positive test for straight leg raising test, Dr. Kessler diagnosed Claimant with lumbar radiculopathy, and prescribed a Medrol dose-pack, some anti-inflammatories, and Vicodin.

Claimant returned to Dr. Kessler on January 24, 2001. Dr. Kessler noted that Claimant had improved since going to therapy, but he remarked that there was still discomfort. Dr. Kessler and Claimant discussed the possibilities of doing an MRI, EMG or an epidural.[12] Claimant also had a series of epidural injections on February 13, February 28, and March 14, 2001. Dr. Kessler saw Claimant, for the last time, on March 27, 2001. At that time Claimant remarked on the tingling in both of his sides, and explained that he had an episode of his leg giving out when he walked. Claimant stated he had severe back pain and needed a wheelchair to get around, even with his medications. Dr. Kessler then referred Claimant to Dr. Katz, with the expectation the Claimant would have to undergo surgery.

Dr. Katz first examined Claimant on April 2, 2001, and at that appointment Dr. Katz recorded a history of Claimant's injury. On that particular visit, Claimant complained of bilateral leg pain and pain in his thighs. Claimant explained that the pain was intermittent and the quality of the pain changed. Claimant was taking Zydone, a narcotic pain medication, at that time. Dr. Katz noted that there were no objective findings at the initial examination, only subjective complaints of pain (JX 2, p. 15). Nonetheless, Dr. Katz recommended a CT myelogram to further evaluate Claimant's back and restricted him from work. The myelogram showed a disc herniation at L4-5 and some impingement on the existing root.

On May 3, 2001, Dr. Katz examined Claimant again. Dr. Katz noted that Claimant was experiencing no acute distress, he was sitting comfortably, but was afraid to move quickly because of groin pain. It was Dr. Katz's opinion that the left lower extremity pain had resolved, and that Claimant was primarily suffering from mechanical lower back pain. Claimant saw Dr. Katz again on June 15, 2001, and discussed the possibility of a TENS unit for the pain.

[12] The MRI showed a disc herniation at L4-5 and the EMG showed changes consistent with a left L5 radiculopathy.

On July 26, 2001, Claimant continued to complain of pain and intermittent symptoms in his leg. At that point, Claimant was in the process of receiving another series of epidural injections.[13] Claimant reported no relief as a result of the second series of injections (JX 2, p. 24). When Claimant saw Dr. Katz on August 23, 2001, Claimant had been authorized to undergo a Functional Capacity Examination, which was performed by Dr. Richard Bunch on August 9, 2001.[14]

Dr. Katz examined Claimant on September 19, 2001, by which time Claimant had an MRI which revealed some stenosis at L4-5. Clinically, Claimant's symptoms were the same, low back pain, slow ambulation, and complaints of significant leg pain.[15] Dr. Katz made an objective finding of leg pain on a straight leg raising test. After a long discussion between Claimant and Dr. Katz, Claimant elected to have a decompressive laminectomy at L4-5, which was performed by Dr. Katz on November 6, 2001, at West Jefferson Medical Center. Dr. Katz expected Claimant to have a full recovery. On November 16, 2001, Claimant was seen for a follow-up appointment with Dr. Katz. Claimant complained of some pain and discomfort in his back, but described the pain was manageable.

Claimant returned to Dr. Katz on December 17, 2001, and was not doing well. He was complaining of pain and discomfort in his legs, and felt that physical therapy had worsened his condition (TR 34-35). Dr. Katz refused to prescribe further medication, due to Claimant's lack of progress in therapy and reports of symptom magnification and complaining (JX 2, p. 33). Dr. Katz explained that by December 2001, Claimant's incision had healed, he had good flexibility, and was neurovascularly intact.[16] Consequently, Claimant's intense pain symptoms did not "fit" the findings. In Dr. Katz's experience, patients who were older than Claimant had recovered more quickly, and therefore, he suspected that there were factors beyond the physical condition which were impacting Claimant. At this appointment, Dr. Katz expected Claimant to continue therapy for another month, and anticipated releasing Claimant to work in 6 weeks (JX 2, p. 36). Dr. Katz also

[13] The epidurals were administered on June 21, July, 15, and July 19, 2001.

[14] Dr. Katz noted that the FCE found Claimant to have a submaximal effort and found that he was capable of performing sedentary work with some restrictions (JX 2, p. 26)

[15] Dr. Katz expressed some concern that Claimant subjective complaints of pain were disproportionate to the physical findings, which is why he recommended Claimant obtain a second opinion regarding surgery. During his deposition, Dr. Katz opined that Claimant's depression could have affected his ability to tolerate pain (JX 2, p. 29-30)

[16] Dr. Katz explained the in spite of surgical skill some patients have a failed surgery that is patient-dependant. Additionally, some patients develop scar tissue which results in significant radicular symptoms, but not necessarily low back pain (JX 2, p. 52).

recommended Claimant continued to see Dr. Gupta for pain management (JX 2, p. 52).

On February 13, 2002, Dr. Katz recorded that Claimant presented inconsistent findings and subsequently discharged Claimant as a patient. During the examination, Claimant moved fairly quickly to illustrate where his pain was located, but when asked to move on his own, Claimant moved very slowly (JX 2, p. 38). Dr. Katz also found that Claimant had normal motor testing in his lower extremities. Dr. Katz stated that he felt that the physical findings were disproportionate to the complaints of pain. At this time, Claimant was discharged because Dr. Katz explained there was nothing further that could be done (JX 2, p. 41).[17] Nonetheless, Claimant returned on May 10, 2002 for a final visit, at which time Dr. Katz reiterated his inability to treat Claimant further, and Claimant's ability to do sedentary work (JX 2, p. 55). Dr. Katz received and approved a list of jobs generated by Ms. Carla Seyler on August 26, 2002, as they were all sedentary positions with little to no lifting requirements.

Dr. Narinder Gupta

Dr. Gupta was accepted as an expert in the fields of pain management and anesthesiology and testified at the formal hearing. (TR 122). Dr. Gupta first saw Claimant on December 6, 2001, based on a referral from Dr. Katz, Claimant's surgical orthopedist (TR 126), for complaints of low back pain and pain in his legs. Claimant had a very painful gait, his pelvis levels were unequal, the hip bones were unaligned, and he had exquisitely tender muscle spasms. Additionally, Dr. Gupta noted that Claimant stood, dressed, and undressed with discomfort (TR 125). Toe walking and heel walking were impaired. After his exam, Dr. Gupta opined that Claimant was suffering from acute myofacial pain spasms as well as degenerative changes. (TR 125). He injected Claimant's upper back as well as the L5-S1 interspinous ligament. He also prescribed Soma, Anaprox and Vicodin ES. (TR 129). Claimant saw Dr. Gupta again on December 20, 2001. Claimant complained of consistent pain, was given one injection and scheduled a follow-up appointment.

On January 17, 2002, Dr. Gupta opined Claimant suffered from failed back syndrome[18] and gave him three injections in the tenderest areas. The injections

[17] Dr. Katz released Claimant with the restrictions which had been determined from the August 2001 FCE, namely a sedentary job (JX 2, p. 41).

[18] This describes a syndrome in which patients have surgery that is not successful through no fault of the procedure, and the symptomology persists. Claimant's complaints were very typical of patients with failed back syndrome (TR

immediately increased Claimant's flexion. (TR 132). Claimant has been very compliant with Dr. Gupta's treatment, including with physical therapy and treatments outside of his office. (TR 134). Claimant continued to be treated monthly by Dr. Gupta throughout 2002, in an effort to improve range of motion by decreasing the pain and thereby allowing Claimant to maintain the improved range of motion. Dr. Gupta explained that he consistently made efforts to get Claimant on therapy and active, while simultaneously having Claimant work with his psychiatrist to improve the depression, and ultimately increase Claimant's threshold for pain (TR 133). Throughout the year, Claimant returned to see Dr. Gupta to be treated for pain symptoms.

By December 11, 2002, Claimant still had chronic degenerative disc disease and myofacial spasms. (TR 136).[19] The type of pain Claimant experienced was the type to be expected from failed back syndrome. (TR 138). Dr. Gupta explained at the formal hearing that he felt Claimant had reached maximum medical improvement (TR 139). Claimant's prognosis was poor and the slightest bit of activity could prompt a regression (TR 139-40). Dr. Gupta explained that after two years of treating and observing Claimant at different times of the day, and different seasons, he noted that Claimant is seldom able to stand for any period of time, often lying down on his side.[20] Dr. Gupta placed the physical restrictions he felt were necessary for Claimant in an OWCP form found at CX 3, p. 23. Dr. Gupta stated that a high degree of chronic pain results in an individual being unable to think clearly, every step is preoccupied with baseline pain (TR 142). These patients, of which Claimant is one, would have trouble doing anything with a degree of efficiency. Dr. Gupta opined that Claimant would continue to need minimally invasive pain management and a therapy program to maintain his maximum medical status (TR 147).

Dr. Gupta examined that list of jobs opportunities compiled by Ms. Carla Seyler, and testified that since Claimant was unable to maintain a certain position for any length of time he did not think Claimant fit for any of the positions. Dr. Gupta commented that he encourages his patients to return to work. He said that people hurt less when they work, however, Claimant's pain is so severe, that Dr. Gupta felt that he would be unable to imagine Claimant doing any work at all (TR

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138): myofacial pain spasms at the site of surgery, painful gait with pain referred to other areas of the back (TR 128). These symptoms can be caused by nerve root irritation, referred pain, and generally the fragile nature of individuals post-operatively.

[19] Myofacial spasms are objective and were at the site of the surgery. (TR 137).

[20] Dr. Gupta also stated that observation of Claimant while he is arriving at the office or leaving, or other small actions can be objective indicators of pain to determine that an individual is not "confabulating" his symptoms (TR 154).

151). Dr. Gupta noted that if there was a pre-existing depression then Claimant would feel the pain more, the threshold of pain would be lower (TR 167). As of January 31, 2002, Dr. Gupta felt that Claimant had reached a point where he would not be expected to have substantial material improvements in his condition (TR 176).

Dr. Richard Roniger

Dr. Richard Roniger, a psychiatrist, examined Claimant on July 31, 2003 on behalf of Employer, and determined that Claimant's depression was no worse before the accident that it was afterwards, adding that Claimant's condition was chronic, long-standing and predated the December 2000 problems (EX 14). Dr. Roniger referred to the "non-organic" findings of other physicians, and found that there appeared to be a strong psychological overlay in this case.

## Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured

employee's employment. *Darnell v. Bell Helicopter Int'l, Inc*., 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on December 30, 2000, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant physically injured his lower back while working on a barge. The extent, duration and disabling effects of that injury, however, are in issue.

Additionally, Claimant has alleged that his depression and debilitating pain are related to his lower back injury. According to both Dr. Gupta, Claimant's pain management physician, and Dr. Davis, Claimant's treating psychiatrist, the debilitating pain as well as severe depression were the result, either directly or indirectly of Claimant's back injury. Employer argues that it was not notified of Claimant's continuing disability, and was thereby prejudiced (Employer's Brief at p.6). However, contradictory to Employer's pleas of ignorance, Dr. Katz's records, which were regularly received by Employer, contain information that even six weeks after surgery Claimant continued to experience pain, and Dr. Katz recommended on December 17, 2001, that Claimant seek help for his pain management. Furthermore, Dr. Katz noted Claimant's depression and anxiety in his notes regarding Claimant's overall condition.

Therefore, I find that there is no significant evidence to rebut a finding that Claimant's severe and chronic pain was a result of his failed back surgery. As Dr. Davis stated, and it is unrefuted, Claimant's depression worsened following his workplace accident, and continues to interact with Claimant's pain threshold. Dr. Davis had the benefit of treating Claimant over a long period of time, whereas, Dr. Roniger simply examined Claimant once, and reviewed the files of other physicians. After reading his report, I remain unclear on exactly how Dr. Roniger came to his conclusion, and consequently I am unwilling to rely on his opinion.

Consequently, it is my finding that Claimant's pre-accident depression was aggravated by his industrial accident, and that his debilitating pain is accordingly related.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Dr. Katz felt that Claimant's orthopedic condition following his back surgery had reached maximum medical improvement on December 17, 2001, when he stated that there was nothing further that he could do for Claimant. Nevertheless, Dr. Katz expressed concern and puzzlement that Claimant was complaining of pain for which there were no findings, and recommended he pursue pain management (EX 10). Shortly before this recommendation, Claimant had sought out Dr. Gupta, and therefore, he continued to see Dr. Gupta after Dr. Katz's recommendation. Dr. Gupta was hesitant to state that Claimant's condition was static; however after specific questioning Dr. Gupta conceded that Claimant's pain had not significantly changed since Claimant January 31, 2002 (Tr. 173-74). Therefore, I find that Claimant's back condition and his resulting pain reached maximum medical improvement on January 31, 2002. As to the psychological condition, however, even though Dr. Davis did not speak specifically to the question of MMI, I infer that it was not until November 8, 2003, that Claimant's psychological condition appeared static. Consequently, I find that to be the date of MMI.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

Claimant is clearly unable to return to his former employment as a laborer for Employer, or in any heavy duty employment. Dr. Katz placed Claimant's restrictions as those that were identified by the Claimant's *pre-operative* Functional Capacity Evaluation in August 2001, namely, he could perform light to sedentary employment with occasional lifting of up to 10 lbs. and frequent lifting of up to 5 lbs., additionally Claimant should avoid squatting and balance activities. Dr. Gupta, at the formal hearing, testified that due to the intense pain Claimant experiences, he would be unable to maintain *any* type of employment.

I find Dr. Gupta's testimony and explanation to be very compelling and convincing and supported by both Dr. Davis' and Dr. McCain's opinions. Dr. Gupta's treatment is a result of the pain which Claimant experienced following the back surgery to correct the injury resulting form his workplace accident (TR 146). As noted by Dr. Gupta, he has seen Claimant during different seasons, times of day, and physical conditions over the course of two years. Consequently, he is in an excellent position to determine whether Claimant is either malingering or in fact disabled. Dr. Gupta explained that he makes an effort to determine the sincerity of any patient's subjective reports of pain, and observed the Claimant's behavior beyond the physical examination.[21] He did not feel that Claimant was exaggerating his symptoms or malingering. Furthermore, Dr. Davis explained that depression

[21]Dr. McCain also felt that Claimant was honest and straightforward and did not magnify his symptoms. He further felt that Claimant could not tolerate a forty hour work week. (CX-13, p. 33).

can lower an individual's threshold for pain, and consequently, Claimant may be disabled by a lower degree of pain than other individuals who were not depressed. Dr. Gupta explained that Claimant's "baseline" pain would cause him to be distracted and "foggy" which would make him incapable of following directions or attaining and keeping even the simplest job.

Therefore, although Dr. Katz was unable to offer Claimant further orthopedic treatment, and determined that Claimant could orthopedically work and had attained maximum medical improvement, I find that Dr. Gupta's treatment of Claimant's pain, and continued attempts to increase Claimant's functionality in spite of his debilitating pain, to be weightier and more convincing medical evidence.[22] In addition to the medical evidence, Claimant's presentation and testimony at the formal hearing have convinced me that Claimant is unable to even perform the light duty or sedentary employment which had previously been found suitable by Dr. Katz.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), rev'g 5 BRBS 418 (1977).

In this instance, I find that the modified light work offered by Employer was not suitable, as Claimant explained that he was unable to perform the painting duties without extreme pain, which was supported by the testimony of Drs. Gupta and McCain. Although Claimant did perform work for Domino's Pizza for two weeks, I find that based on his testimony as well as the narcotic medication on which he relied, the employment at Domino's was not suitable employment for Claimant, especially in light of his testimony that he drove down a one way street the wrong way because of the effects of the medication. When a claimant works due to an extraordinary effort and in spite of excruciating pain and diminished strength the Claimant is not performing suitable alternative employment. *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451, 7 BRBS 838, 850 (4th Cir. 1978), aff'g 5 BRBS 62 (1976).

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage

[22] Dr. Davis does not believe that Claimant can work. He feels there is interaction with his chronic pain and his depression and that Claimant would not be able to function in a work environment. Claimant's pain would interfere with his ability to follow instructions in terms of patience and his ability to interact. (CX-12, p. 26).

and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp*., 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979).

As explained above, I find that Claimant was incapable of work in spite of Dr. Katz's release and *pre-surgery* restrictions. Therefore, Ms. Seyler's labor market survey which was based only on the restrictions given by Dr. Katz, and not by Dr. Gupta or McCain, would not be relevant. Ms. Seyler agreed that if in fact Claimant was having difficulty driving under the influence of his narcotic pain medication, then he would not be able to perform the driving positions (Tr. 196). Accordingly, I find that Claimant's level of disability is directly related to the severity of his pain in tandem with his depression, and Claimant continues to be unable to work. Therefore, Claimant was temporarily totally disabled from December 30, 2000 until January 31, 2002, the date of maximum medical improvement, at which point he became totally permanently disabled to the present and continuing.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv*., 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.,* 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the

treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.,* 682 F.2d 968 (D.C. Cir. 1982) (per curium) rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys*., 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros*., Inc., 16 BRBS 10 (1983).

Claimant argues that while Employer did pay for Dr. Katz and Claimant's surgery, it has not paid for pain management nor for psychiatric treatment, notwithstanding that Dr. Katz recommended pain management. Employer also refused to pay for it though requested by Claimant and his wife. (Tr. 49). Accordingly, Claimant alleges that Employer is responsible for all costs associated with pain management. In addition, Claimant maintains, and I agree, that his psychiatric condition was aggravated by the work accidents, and Employer is therefore also responsible for the medical expenses of Dr. Robert Davis. I agree.

Employer argues notwithstanding such a finding, however, that Claimant never requested authorization for any of the doctors beyond Dr. Katz, and therefore, they are not responsible for those unauthorized visits. In addition, Employer points out that Drs. Gupta, McCain, and Davis failed to comply with the portion of the Act which mandates that they send reports to Employer within ten days following the first treatment, and the failure to do so results in Employer/Carrier being freed from liability for the expense incurred. The burden of proof of compliance is on the Claimant. *Maryland Shipping & Dry Dock v. Jenkins*, 10 BRBS 1 (4th Cir. 1979).

The Act provides for a 10 day compliance with the medical report requirement; however, section 702.422(b) of the Code of Federal Regulations states "for good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act..." C.F.R. §702.422(b)(1985). The pre-1985 regulations allowed both an administrative law judge (ALJ) and the District Director to make this decision. *see Armfield v. Shell Offshore, Inc*., 25 BRBS 303 (1992); however, the Benefits Review Board has taken notice that the revised (1985) regulations only grant the District Director discretion in this area, and the Board has held that an ALJ cannot decide whether or not to excuse a doctor's failure to send a report of treatment to an employer within 10 days of providing the medical care. *Toyer, et al. v. Bethlehem Steel Corp*., 28 BRBS 347, 351-355

(1994); *Krohn v. Ingalls Shipbuilding, Inc. et al.*, 29 BRBS 72, 75 (1994); *Jackson v. Universal Maritime Service Corp*., et al., 31 BRBS 103(1997).

Consequently, because Employer has claimed that it received no reports from any of the doctors, and there is no significant evidence to controvert that claim, I am unable to excuse, or not excuse, Claimant's physicians' failure. So even though I have determined that Employer is otherwise liable for Drs. Gupta, McCain, and Davis, I cannot proceed to order liability upon Employer at this time. Consequently, as per the Board's instruction, and as convoluted as it might appear, I must now remand the issue of §7(d)(2) to the District Director, who may, for good cause and in the interest of justice, waive the requirement as to these three medical providers.

As to on going liability, however, I find that based on Claimant's level of pain, Dr. Gupta's treatment continues to be necessary and reasonable and therefore, I find that Employer/Carrier is liable for Claimant's continued pain management treatment as is necessary to maintain Claimant's level of maximum medical improvement. Additionally, as discussed above, since Claimants' depression was aggravated by his work place accident, and continues to contribute to his total disability by lowering his threshold for pain, I find that Dr. Davis' treatment is also reasonable and necessary, and therefore, future treatment by Dr. Davis is likewise Employer/Carrier's responsibility.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), rev'd 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) cert. denied, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v.*

*Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. See *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).

The parties agree that neither (a) nor (b) is an appropriate means to calculate the average weekly wage of Claimant. Claimant did not work substantially the whole year for Employer, and there is not sufficient evidence in the record to support a calculation using 10(b). Therefore, I find that 10(c) is the appropriate means by which to calculate Claimant's average weekly wage.

Employer suggests that Claimant's wage be based on an average weekly wage of $287.60. At the conclusion of the formal hearing, counsel for Employer stated that he simply added up Claimant's year to date earnings and divided by 52 (Tr. 204). Claimant, on the other hand, makes two suggestions on computing average weekly wage. For both, Claimant computed his prior year earnings by using his 2000 earning as listed in the records of the Louisiana Department of Labor (EX-7, pp. 2-3) as well as (EX-20, pp. 6, 50 and EX-21,p. 7).[23]

Taking the prior year earnings of $21,501 and dividing by 52 weeks, the average weekly wage is $413.48. However, Claimant testified that it was three weeks after he was fired at Test, Inc. before he got the job with Delta Terminals. (Tr. 28). Accordingly, for a fair representation, his prior year earnings should be divided by 49 weeks rather than 52 weeks. This comes out to an average weekly wage of $438.80. I accept this approach because Claimant had a good work history and was never long without employment. He lost his job at Test, Inc., due to lack of skill and not by choice. Once he did, he recovered as quickly as possible with new employment. Consequently, I find that by dividing Claimant's earning from 2000 ($21, 501) by 49 weeks, the average weekly wage which would most fairly and reasonable represent Claimant's wage earning potential is $438.80.

**§908 (j)**

According to the Act, the employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who--

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings, and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

[23] Lance, Inc.$ 7,256; Total Engineering Services (TEST, Inc) $ 1,012; Jefferson Parish School Board $ 9,472; Delta Terminal Services $ 3,761: TOTAL $21,501

In the instant case, Employer argues that Claimant failed to report his earnings at the one day of light duty employment with Employer as well as the two weeks Claimant worked at Domino's as a pizza delivery driver. Claimant did eventually report these two jobs, when he completed the second LS-200 *with his attorney*. As discussed above, in reference to the nature and extent of Claimant's disability, I found that since Claimant's accident took place on December 30, 2000, he has been totally disabled. Therefore, in spite of Claimant's efforts to work, the position offered by Employer, and the position Claimant attempted to work at Dominos were both unsuitable. Accordingly, I am not surprised Claimant did not mention the jobs on his initial LS-200, especially since both were of such short duration. I disagree with Employer in this instance, and based on Claimant testimony at the formal hearing, as well as the circumstances under which Claimant worked, as well as the way his initial LS-200 was completed (without an attorney), I find that Claimant did not intend to willfully misrepresent his earning throughout this period and thereby defraud Employer/Carrier.

This is not the set of facts which requires for Claimant to forgo his compensation as a result of misleading Employer by failing to state wages earned. Employer suggests that any argument regarding the fact that wages were minimal is without merit, but I disagree. The small amount of earning (EX 8) goes to how willful Claimant's omission was, and therefore, without adequate proof that Claimant meant to omit his earnings, I find that Claimant continues to be entitled to benefits from the date of his accident December 30, 2000 through the present, and Claimant's initial mistake was neither willful nor the type of omission for which §8(j) was designed to correct.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation timely. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

## ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 30, 2000 until November 8, 2003 , the date of maximum medical improvement for his psychological condition, based on an average weekly wage of $438.80;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from January 31, 2000 until present and continuing, based on an average weekly wage of $438.80;

(3) Employer/Carrier shall pay or reimburse Claimant for all future reasonable and necessary medical expenses, resulting from Claimant's injuries of December 30, 2002, including the continuing treatment of Dr. Narinder Gupta and Dr. Robert Davis; however, the issue of medical expense debt as to Drs. Gupta, McCain, and Davis, though I find the expenses to be reasonable and necessary, is remanded to the District Director to determine whether the untimely filing of these doctors' initial medical reports may be excused in the interests of justice;.

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 7th day of May, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam